

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Signed
77-1076

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL PEREZ,

Defendant-Appellant

ON APPEAL FROM
THE

JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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nev.

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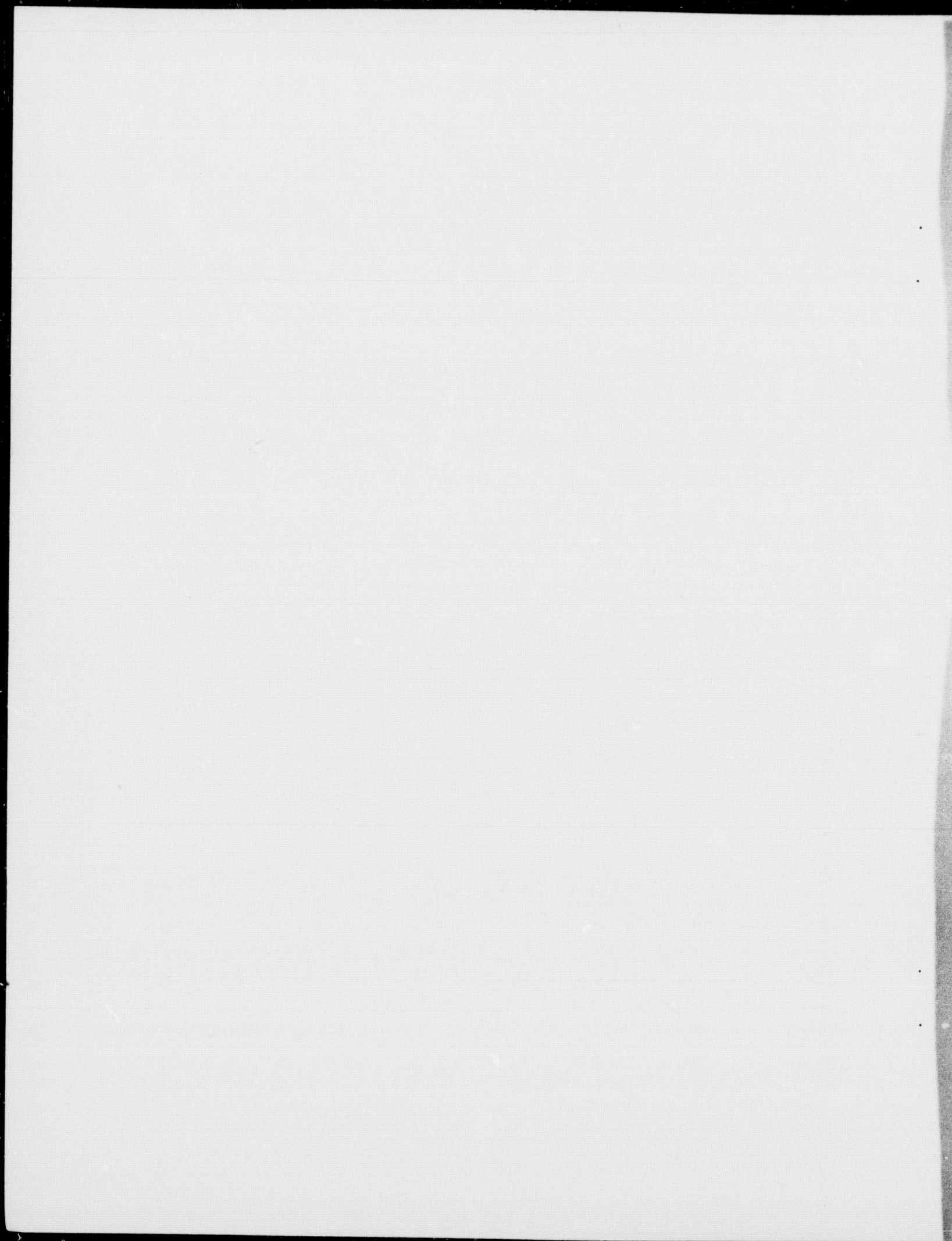
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UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

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Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the defendant's retrial on two counts on which a jury previously had been unable to agree violated his right to be free from being placed in double jeopardy.
2. Whether sufficient evidence was presented to establish the defendant's guilt beyond a reasonable doubt.
3. Whether the defendant's miscellaneous claims of error require reversal.

STATEMENT OF THE CASE

This is an appeal by Daniel Perez, hereinafter the defendant, from a judgment of conviction on two counts of having violated Section 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.). Specifically, he was convicted of unlawfully and willfully causing the preparation of a United States Information Return (Internal Revenue Service Form 1099) which was false and fraudulent as to material matters--i.e., the name of the recipient of income arising from the payment on winning pari-mutuel tickets issued by the New York Racing Association.

The defendant was indicted on May 19, 1976, on three counts of violating 26 U.S.C., Section 7206(2). On July 27, 1976, following a jury trial, the defendant was acquitted of the first count of the indictment. The jury, however, could not reach a unanimous verdict as to Counts Two and Three and a mistrial was declared as to those two counts. (R. A-2.)^{1/} Following a second trial in December, 1976, defendant was convicted on Counts Two and Three. (R. A-3.) Defendant was sentenced on February 11, 1977, to concurrent terms of two years in prison, with execution of the sentence suspended. He was placed on probation for three years, under the special condition that he attend Gambler's Anonymous on a regular basis as directed by the Probation Department. (R. B.) The defendant filed his notice of appeal on the same day.

1/ "R." references are to the separately bound record appendix.

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

The facts pertinent to this appeal may be summarized as follows:

From November, 1975, through February, 1976, Gerald Levy, a special agent of the Internal Revenue Service, was in charge of an investigation at Aqueduct Racetrack, New York. (Tr. I-36.)^{2/} During the course of his investigation, Levy observed that the defendant was at the racetrack daily. He further observed that the defendant would be in the area near the window at which patrons could cash their winning tickets on triple bets,^{3/} and that defendant often approached and spoke to people who were standing in line to cash their winning tickets at this window. (Tr. I-37.)

On January 27, 1976, Levy observed the defendant filling out a form at the over \$600 previous day window^{4/} and, after turning in the form, receive from the cashier at the window several hundred

^{2/} "Tr. I." through "Tr. III." references are to the three volume transcript of the second trial which lasted from December 8, 1976, through December 13, 1976.

^{3/} The "triple" bet is made on the ninth race at Aqueduct and is won by picking the horses that come in first, second and third in the ninth race. The "daily double" is won by picking the winner of the first and second race. The "exacta" is won by picking the horses that come in first and second in a race. The odds of winning any of the above-described bets are very high and accordingly a \$2 winning ticket will sometimes return over \$600. (Tr. I-38-40.)

^{4/} When a bettor wins in excess of \$600 on a \$2 bet he is required to present identification and fill out a verification form at special windows which only pay winnings in excess of \$600. There is also one window--the over \$600 previous day window--which pays winnings of over \$600 from previous days but for which the winning tickets have not yet been cashed.

dollar bills. Immediately after the defendant left the window, Special Agent Levy initialed the form which contained the name, address and purported signature of a Carlos Diaz, 148 West 17th Street, Apartment 5, New York, New York. The form also indicated that the social security number of the person who signed the form was 129-48-1254. (Tr. I-43-46, 53, 58.)

Levy further testified that on January 21, 1976, he saw the defendant fill out an information form at the previous day over \$600 window, and after turning the form in receive several hundred dollar bills. At Levy's direction, another agent initialed the form, which contained the same name, address, signature and social security as on the form the defendant filled out on January 27, 1976. (Tr. I-69-72.)^{5/}

Marvin Rennert, a document analyst with the Treasury Department, testified that after examining handwriting specimens of the defendant, he reached the conclusion that the defendant had signed each of the identification forms. (Tr. I-173-178.)^{6/}

^{5/} At the first trial of this case, Levy testified that on November 24, 1975, he observed the defendant cashing a winning ticket paying in excess of \$600 for a \$2 bet and completing the identification form necessary to cash such a winning ticket. Levy examined, initialed and dated the form which contained the name, address and purported signature of a Miguel Valles, 865 Crontona Park, New York, New York.

^{6/} At the first trial, Rennert had been unable to state definitely that the defendant had signed the identification form dated November 24, 1975, bearing the name Miguel Valles. He did, however, testify that it was his opinion that the defendant had signed the two identification forms bearing the name Carlos Diaz.

Joseph Burns, Assistant Treasurer of the New York State Racing Association, the owner of Aqueduct Racetrack, testified that before a bettor can cash a winning ticket paying 300 to 1 odds or better, he is required to fill out an identification form (Form 317). The information on the form is then used by the Association to prepare Internal Revenue Service Form 1099--an information return.^{7/} Copies of this form are sent by the Association to the bettor and to the Internal Revenue Service.

(Tr. II-24-25.) Burns also testified that two 1099 Forms (Exs. 2, 3) were filed with the Government and were prepared from the identification forms that the defendant had filled out. (Tr. II-31-34.)

The Government also produced an 18-year old high school student named Carlos Diaz, whose social security number was the same as that on the forms filled out by the defendant--129-48-1254 (Tr. II-79-82.) He testified that he had previously lost his social security card; that he had never lived at the address, nor had any relatives living at the address, given by the defendant on the identification forms; and, that he had not filled out the identification forms nor authorized anyone to do so. (Tr. II-82-86.) Diaz further testified that he had never been to a racetrack; that he had never placed a bet

7/ 26 U.S.C. § 6041(a) provides, in part, as follows:

All persons * * * making payment
* * * to another person, of rent,
salaries, wages, * * * of \$600
or more in any taxable year * * *
shall render a true and accurate

at the offtrack betting corporation; that he had never asked anyone else to place a bet for him; that he did not know nor had he ever seen the defendant; and, that he had never seen nor authorized anyone to fill out in his name the identification forms filled out by the defendant.

The defendant testified that he had never won over \$600 on a \$2 bet and that the most he had ever won was \$500 on a single bet. (Tr. III-58, 60.) He also testified that he was aware that winners of over \$600 on a \$2 bet were required to fill out an identification form before they could collect their winnings (Tr. III-60) and that he had not cashed a winning ticket for Carlos Diaz (Tr. III-64). When he was asked whether it was his handwriting on the two identification forms, defendant responded (Tr. III-65):

If I didn't sign it, how could
it be my handwriting.

Later, he responded "no" when asked by the judge if he signed either identification form.

The jury reached a verdict of guilty as to both counts, and this appeal followed.

7/ (continued)

return * * * setting forth the
amount of such gains, profits,
and income, and the name and
address of the recipient of such
payment.

SUMMARY OF ARGUMENT

1. Defendant appeals from his conviction on two counts of violating 26 U.S.C., Section 7206(2). Specifically, he was charged with signing and completing New York Racing Association verification forms which caused the NYRA to file Internal Revenue Service Information returns which were false as to a material matter--the names of the recipients of income on winning pari-mutuel racetrack tickets were falsely reported. Defendant was originally tried on three counts of violating Section 7206(2) of the Internal Revenue Code and was acquitted on the first count. A mistrial was declared as to the second and third counts because the jury could not reach an agreement as to his guilt or innocence, and defendant was subsequently retried and convicted on those two counts. He contends now that his conviction should be reversed because his retrial resulted in his being twice placed in jeopardy. Primarily, he contends that if the trial judge had answered the jury's questions properly at the first trial, he would have been acquitted on all counts because the jury had determined that he had not committed the offenses charged in the second and third counts.

It is undisputed, however, that defendant failed to raise this contention at trial, and, accordingly, we submit that he waived any right he had in this regard. Moreover, defendant did not raise the defense of double jeopardy which he now asserts, either in his petition for a writ of mandamus, which

he filed in this Court prior to his second trial, or in his motion to dismiss the indictment, which he filed prior to the second trial. Rather, he merely asserted that if the jury acquitted him as to the first count, there could not have been sufficient evidence to convict him on the other two counts. Thus he cannot deny that he waived the double jeopardy claim he now raises in this Court.

Even if defendant had timely raised his claim of being placed in double jeopardy, the District Court would have been correct in rejecting it. It is well established that when a jury cannot agree as to the guilt or innocence of a defendant, the court may, in its discretion, declare a mistrial without creating a bar to a future trial on the same offense. Furthermore, there is no validity to the defendant's assertion that the jury in the first trial had determined that he had not committed the offenses charged in the second and third counts of the indictment and would have acquitted him had the court properly responded to the jury's questions. Rather, the trial judge acted properly and well within his discretion when he instructed the jury to rephrase a manifestly unclear note. Indeed, the fact that the trial judge subsequently reiterated the essential elements of the offenses and instructed the jury that the Internal Revenue Service Returns could not be false and fraudulent if none of the information contained therein was incorrect was a proper response resulting in no prejudice to the defendant.

2. Defendant also contends that the Government did not present sufficient evidence to establish his guilt beyond a reasonable doubt under the theory on which the Government proceeded. He contends that the theory of the Government's case was that he was paid by other individuals to cash their winning tickets so that the names of these other individuals and the amount of their winnings would not be reported to the Internal Revenue Service. He thus contends it was necessary for the Government to demonstrate who in fact was the true winner. The Government, however, did demonstrate that neither the defendant nor the person whose name he signed on the racetrack's verification form was the true winner and thus that the defendant had filled out the verification form in a false and fraudulent manner.

Defendant also argues that his acquittal on Count 1 at the first trial indicates that the jury must have viewed as incredible the evidence as to Counts 2 and 3. But the charges here were not such that an acquittal on one count necessarily compelled an acquittal on the others and if, as the defendant asserts, the jury had disbelieved the Government's evidence as to the remaining counts, he would have been acquitted of those charges.

3. Defendant contends that the trial judge committed three errors in charging the jury. Nevertheless, defendant only raised one of these objections at the completion of the charge, and,

accordingly, he may not assert as error those portions of the charge or omissions therefrom to which he did not object.

Moreover, as to all his contentions, even if they were properly before this Court, they are without merit, and this is also true of his other miscellaneous claims of error.

The judgment of conviction should be affirmed.

ARGUMENT

I

THE DEFENDANT'S RIGHT TO BE FREE
FROM BEING PLACED IN DOUBLE
JEOPARDY WAS NOT VIOLATED

In July of 1976, defendant was tried on three counts of violating 26 U.S.C., Section 7602(2). He was acquitted on the first count and the jury was unable to agree as to the second and third counts. A mistrial was declared as to those two counts. Defendant was retried on the second and third counts, and he was convicted. He now argues that his conviction should be reversed because his constitutional protection from being placed twice in jeopardy was violated when he was retried. It is his theory (Br. 25-31) that the jury in the first trial had determined that he had not committed the offenses charged in the second and third counts of the indictment and would have acquitted him had the court properly responded to the jury's questions. We submit, however, that defendant waived this constitutional right when he did not raise it at the time of trial and that, in any event, the defense of double jeopardy is not applicable in the situation presented here.

Rule 12(f) of the Federal Rules of Criminal Procedure provides that the "[f]ailure by a party to raise defenses or objections * * * which must be made prior to trial, * * * shall constitute waiver thereof." And, it has long been held that (United States v. Scott, 464 F. 2d 832, 833 (C.A. D.C., 1972)):

The constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the

time of trial, will be regarded as waived.

Accord United States v. Buonomo, 441 F. 2d 922 (C.A. 7, 1971); Grogan v. United States, 394 F. 2d 287 (C.A. 5, 1967), cert. denied, 393 U.S. 830 (1968); Fernia v. United States, 340 F. 2d 837 (C.A. 8, 1965); Haddad v. United States, 349 F. 2d 511 (C.A. 9, 1965), cert. denied, 382 U.S. 896 (1965).^{8/}

It is undisputed that defendant failed to raise at trial a claim that he was being subjected to double jeopardy. Nevertheless he contends that he raised such a defense in a petition for a writ of mandamus which he filed in this Court prior to the second trial and in a motion to dismiss the indictment which he filed prior to the second trial, and, thus, did not waive that defense.^{9/} That, however, is clearly not the case. Rather, we submit that the defendant simply failed to raise in the court below the defense of double jeopardy which he now asserts.

^{8/} The defense of former jeopardy may be raised by motion prior to the trial because the protection against double jeopardy is intended to avoid repeated prosecutions for the same offense, as well as repeated punishment. Green v. United States, 355 U.S. 184 (1957); United States v. Beckerman, 516 F. 2d 905, 906 (C.A. 2, 1975). See United States v. Young, 503 F. 2d 1072, 1074 fn. 7 (C.A. 3, 1974).

^{9/} We note that there was no appeal from the denial of the motion to dismiss the indictment. To the extent that the motion alleged that retrial would violate the Double Jeopardy Clause, the Supreme Court has recently held that the denial of such a motion is immediately appealable. Abney v. United States, 45 U.S. Law Week 4594 (Sup. Ct., June 9, 1977). Although Abney had not been decided at the time that the motion to dismiss the indictment was denied, this Court had held that the denial of a motion to dismiss an indictment based on a double jeopardy claim was an appealable order. United States v. Beckerman, 516 F. 2d 905, 906-907 (C.A. 2, 1975).

Indeed in his motion to dismiss the indictment, defendant merely states that he was "brought to trial once on these charges, and acquitted of the First Count which is the same crime as is charged in the remaining two counts." And in his memorandum in support of the motion defendant merely states:

The acquittal of defendant of one of the three identical acts, when the jury well knew that his name was Daniel Perez and not Carlos Diaz would seem to bar a conviction on the other two acts, wherein he put the name Miguel Valles on the identification form. If he committed no crime when he used the name Carlos Diaz, it is difficult to see how a jury could find him guilty of committing a crime when he put the name Miguel Valles to an identical form under identical conditions.^{10/}

We submit that neither the motion to dismiss nor the memorandum in support thereof raised the issue of double jeopardy which defendant raises (see p. 11, supra) in this Court. Rather, they merely seem to argue that if the jury acquitted defendant as to the first count, there could not have been sufficient evidence to convict him on the second and third counts.^{11/}

^{10/} Defendant, of course, erred in stating that the acts were "identical." Rather, he was accused in one count of improperly signing the name Miguel Valles and in two other counts of improperly signing the name Carlos Diaz. Contrary to defendant's assertion, he was only acquitted of improperly signing the name Miguel Valles. No verdict was reached as to the counts charging him with improperly signing the name Carlos Diaz.

^{11/} As to the invalidity of this argument, see pp. 23-25, infra.

Similarly the petition for a writ of mandamus only stated that the District Court's response to the questions of the jury at the first trial denied him due process and that subjecting him to a second trial "would be a gross miscarriage of justice, constitutes double jeopardy and would be 'highly deleterious to the administration of justice.'" We submit, however, that inserting one phrase in a petition for a writ of mandamus hardly meets Rule 12(f)'s requirement of raising defenses or objections prior to trial. Indeed, as the pertinent notes of the Advisory Committee of the Federal Rules of Criminal Procedure make clear, "the defendant * * * [has] an obligation to raise the issue at the motion date set by the judge." (Emphasis supplied.)

Finally the cases cited by defendant (Br. 31, fn.) do not support his contention that it would have been futile and thus unnecessary for him to raise the claim of double jeopardy in a motion prior to his second trial.^{12/} Thus defendant cannot deny

^{12/} In United States v. Dinitz, 424 U.S. 600 (1976) the Supreme Court reversed the holding of the Fifth Circuit that when a defendant has "no choice" but to request a mistrial he had not waived his right to be protected from being placed twice in jeopardy. And in United States v. Grasso, 552 F. 2d 46 (C.A. 2, 1977) petition for writ of certiorari filed May 6, 1977, Sup. Ct. 76-1543, this Court held that a retrial would place a defendant in double jeopardy because the District Court had not explored alternatives to a mistrial which resulted from a prosecution witness recanting his testimony and because the defendant had not consented to a mistrial. Here, to the contrary, there is no basis for the assertion (Br. 31, fn.) that "any further hue and cry was futile," since defendant had never brought the alleged problem to the attention of the District Court in the first instance.

that his failure to raise in the court below the claim of double jeopardy constituted a waiver of his right.^{13/}

Even if the defendant had timely raised his claim of being placed in double jeopardy, however, the District Court would have been correct in rejecting it. Indeed, it is well established that when a jury cannot agree as to the guilt or innocence of a defendant, the court may, in its discretion, declare a mistrial without creating a bar to a future trial on the same offense. United States v. Castellanos, 478 F. 2d 749 (C.A. 2, 1973); United States v. Perez, 9 Wheat. 579 (1824), 22 U.S. 579 (1824); Grogan v. United States, *supra*, p. 289; Durham v. Wyrick, 545 F. 2d 41 (C.A. 8, 1976); United States v. Gunter, 546 F. 2d 861 (C.A. 10, 1976). That, of course, is what happened here, and, accordingly, defendant cannot claim that he was deprived of his right to be free from being placed in double jeopardy.

^{13/} Cf. Lee v. United States, 45 U.S. Law Week 4661 (Sup. Ct., June 13, 1977) (retrial after a midtrial dismissal because of a defect in the information did not violate the Double Jeopardy Clause where the defendant's last minute timing of his motion to dismiss virtually assured that jeopardy would attach before the motion could be decided, and where the defendant made no effort to withdraw the motion after jeopardy attached and did not object when the court decided to terminate the proceedings without having entered any formal finding on the general issue); Jeffers v. United States, 45 U.S. Law Week 4691 (Sup. Ct., June 16, 1977) (where the defendant requested separate trials on two indictments charging him with a greater and lesser included offense, there was no violation of the Double Jeopardy Clause where he was tried for the greater offense after having been convicted of the lesser included offense).

Furthermore, we submit that there is no validity to the defendant's assertion (Br. 25-31) that the jury in the first trial had determined that he had not committed the offenses charged in the second and third counts of the indictment and would have acquitted him had the court properly responded to the jury's questions.

Initially, we note that it has long been held that when a jury requests further instructions from a judge during its deliberations, it is within the discretion of the judge to deny the request, and unless that discretion is clearly abused, such a denial does not constitute grounds for reversal. United States v. Toney, 440 F. 2d 590 (C.A. 6, 1971); Whitlock v. United States, 429 F. 2d 942 (C.A. 10, 1970); Batsell v. United States, 403 F. 2d 395 (C.A. 8, 1968), cert. denied, 393 U.S. 1094 (1969). Here the defendant has neither shown that he suffered prejudice as a result of the judge's responses or that the judge's responses constituted an abuse of discretion.

It appears defendant is primarily concerned with the manner in which the court below responded to the jury's second request (Ct. Ex. 2):

Re Count 1 and 2, conceding that all information on the 1099 is accurate and correct, and that all the information on NYRA Form Number 317 is in fact accurate and correct, other than the signature which is conceded to be a forgery authorized by the person whose name is used, to wit: Don Carlos Diaz, can he possibly be considered guilty of the last two counts.

Defendant contends that (Br. 26) "nothing could be plainer than the language" of this request, and that had the lower court responded, he would have been acquitted on the second and third counts. It is the defendant's position that the jury's note reveals that it had determined that the defendant had been authorized to sign the name of Carlos Diaz on the NYRA Forms 317. We disagree. The note from the jury was ambiguous. The court below properly stated that there were "too many ideas within the one request" and, accordingly, requested the jury to rephrase the question.^{14/}

Such an action on the part of the court below with respect to this request, and subsequent requests (Ct. Ex. 3), was not only proper, but was in keeping with this Court's teaching that if a note from the jury is manifestly unclear and cannot be answered intelligently, clarification should be sought. United States v. Schor, 418 F. 2d 26 (C.A. 2, 1969). This, of course,
^{14/} The jury rephrased the question as follows (R. F-1, p. 9)--

If all the information on the 1099 is accurate, can Daniel Perez still be guilty by virtue of the forged signature on the NYRA No. 317?

The judge stated that the use of the word "accurate" was confusing and the jury restated its question (R. F-1, p. 15)--

If all the information on the 1099 is truthful, can Daniel Perez still be guilty by virtue of the forged signature on the NYRA No. 317.

The judge eventually instructed the jury that the Internal Revenue Service Return (Form 1099) could not be false and fraudulent if none of the information contained therein was inaccurate. (R. F-3, p. 3A.)

is what happened here. And, more importantly, the trial judge not only subsequently reiterated the four essential elements of the offenses with which defendant was charged (R. F-2, pp. 6-8; R. F-4, pp. 7-8), he also, in response to the jury's request (Ct. Ex. 7), instructed the jury that the Internal Revenue Service Return (Form 1099) could not be false and fraudulent if none of the information contained therein was incorrect (R. F-3, p. 3A). This response was clearly correct and completely undercuts the defendant's argument that the jury had determined that he had not committed the offenses charged in the second and third counts of the indictment--i.e., caused the preparation of Forms 1099 in which the names of the recipients of income from payment of winning pari-mutuel tickets were falsely stated. Had the jury believed that the names of the recipients of income were not falsely stated in the Forms 1099 (that is, had the jury believed that Carlos Diaz, the name signed by the defendant, was, in fact, the true winner or entertained a reasonable doubt as to whether defendant was without authority to sign this name)^{15/}, it would have had to acquit the defendant under this instruction

^{15/} Defendant suggests (Br. 27) that the district court "should have given the missing witness charge so that the jury could have found that the testimony that Carlos Diaz would have given would have been unfavorable to the prosecution, that is that he had authorized defendant to sign his name * * *." But the defendant did not request such an instruction. See Rule 30, Federal Rules of Criminal Procedure. Moreover, in his brief defendant does not suggest that Diaz was more available to the Government than to him and, thus, that a missing witness instruction was appropriate. See United States v. Miranda, 526 F. 2d 1319, 1331 (C.A. 2, 1975); 18 U.S.C. § 3006(a) and Rule 17(b) of the Federal Rules of Civil Procedure.

of the District Court. The fact that it did not clearly indicates that the jury had not reached any unanimous conclusion on this factual issue.^{16/}

In short, it is clear that the retrial of the defendant on the second and third counts of the indictment did not violate the Double Jeopardy Clause.^{17/}

^{16/} If the defendant's position is that the jury's notes, rather than clearly revealing that the jury had determined that the defendant had been authorized to sign the name of Carlos Diaz on the NYRA Forms 317, merely suggested that the jury was having some difficulty with the concept of one signing another's name with authority, the lower court's response was even more obviously correct. Had the court attempted to enlighten the jury in this regard when it might, in fact, have been of no concern to the jury, the result could be serious confusion on the part of the jury and an impermissible intrusion on the jury's deliberations. By asking the jury to rephrase its question, the court gave the jury the opportunity to specify the area of its concern. Had the jury truly been concerned with the concept of one person signing another's name with authority, the manner in which the court handled the problem gave the jury the opportunity to so advise the court.

Moreover, we submit that there is compelling evidence that the District Court handled the problem in an appropriate manner. Thus, the jury's second question was specifically directed to Counts 1 and 2, and the jury acquitted the defendant as to Count 1, despite what the defendant now contends was an inadequate response by the trial judge.

^{17/} Defendant also asserts (Br. 30-31) that Government trial counsel, by opposing defendant's requests for further instructions and by not stating his interpretation of the applicable law, failed to fulfill his duty to see that justice is done. Defendant fails to cite any authority as to why this conduct was inappropriate or why it should result in reversal of the conviction.

II

SUFFICIENT EVIDENCE WAS PRESENTED
TO ESTABLISH THE GUILT OF THE
DEFENDANT BEYOND A REASONABLE
DOUBT

Defendant was convicted on two counts of violating 26 U.S.C.
§ 7206(2), which, in pertinent part, provides that a person shall
be guilty of a felony if he--

willfully aids or assists in,
or procures, counsels or advises
the preparation or presentation
under, or in connection with any
matter arising under, the internal
revenue laws, of a return, * * *
or other document, which is
fraudulent or is false as to any
material matter, * * *.

Each of the two counts under which the defendant was indicted
and later convicted stated that the defendant (R. C):

unlawfully, wilfully and knowingly did
aid and assist, procure, counsel, advise
and cause the preparation and presentation,
in connection with matters arising under
the Internal Revenue laws of the United
States, of a return and document to wit,
a United States Information Return, Form
1099, which was fraudulent and false
as to material matters in that the name
of the recipient of the income from
payment of a winning pari-mutuel * * *
ticket issued by the New York Racing
Association, Inc., Jamacia, New York,
was falsely stated, misrepresented and
concealed.

Defendant contends (Br. 32-35) that the Government did not present
sufficient evidence to establish guilt beyond a reasonable
doubt under the theory on which the Government proceeded. He

contends that the theory of the Government's case was that he was paid by other individuals to cash their winning tickets so that the names of these other individuals and the amount of their winnings would not appear on Internal Revenue Service Information Return, Form 1099, which is filed by the racetrack. Thus, the defendant contends that in order for the Government to have prevailed below, it was necessary to demonstrate who in fact was the true winner. This argument has no support in either law or logic.^{18/}

Defendant does not contend that the Government failed to present evidence by which the jury could have concluded beyond a reasonable doubt that the defendant signed the NYRA verification forms. Rather, he asserts that the evidence fell short of demonstrating that defendant filled out the verification forms in order to conceal the identity of the true winner. Defendant

^{18/} Defendant suggests (Br. 32-34) that this case was presented to the grand jury on the theory that defendant was cashing winning tickets for others in return for a share of the winnings and that the Government did not try this case on that theory, conceding at trial that it did not know whether or not the defendant was the true winner. But the material the defendant cites (Br. 33) in support of his proposition that this case was presented to the grand jury on the theory that defendant was cashing winning tickets for others in return for a share of the winnings hardly establishes that proposition. Moreover, whatever the particular theory, the grand jury returned an indictment charging the defendant, in essence, with causing the preparation and presentation of Forms 1099 in which the names of the recipients of income from payment of winning pari-mutuel tickets were falsely stated, and that is precisely what the evidence of trial established. Moreover, contrary to the defendant's suggestion (Br. 34), it is conceivable in light of the evidence that defendant forged the name of Carlos Diaz that the grand jury would not have returned this indictment had

fails to recognize, however, that his testimony (Tr. III-58-59) that he never won \$600 on a two dollar bet was sufficient to preclude a conclusion that he was the "true winner." And, coupled with the undisputed testimony of Carlos Diaz, whose social security number was the same as that on the verification form (Tr. II-83-86), that he had never been to the racetrack, had never asked someone to place a bet for him at the offtrack betting corporation or the racetrack, did not know the defendant and had never authorized anyone to sign his name and social security number on the verification forms, the defendant's testimony was sufficient to compel beyond a reasonable doubt the conclusion that the defendant had filled out the verification form in a false and fraudulent manner.

Moreover, and in any event, defendant misconceives the proof necessary to reach a finding of guilt under 26 U.S.C. 7206(2). Indeed, all that the Government need prove is (1) that the defendant aided, assisted, procured, counseled, advised or caused the preparation and presentation of an Internal Revenue Information Return, Form 1099; (2) that the Information Return, Form 1099 was fraudulent or false as to a material matter; and, (3) that the act of the defendant was wilful. See United States v. Crum, 529 F. 2d 1380, 1382 fn. 2 (C.A. 9, 1976).

Here, the Government demonstrated that when defendant completed an NYRA verification form without the name and

18/ (continued)

it been told (and this assumes, of course, that it was not) by the prosecutor that the Government did not know whether the defendant was or was not the true winner.

social security number of the true winner he caused an Internal Revenue Service Information Return, Form 1099 to be prepared; that the form was false as to a material matter (the name and address of the true winner); and, that he did so willfully. Accordingly, the Government need not have shown who was the "true winner" in order to prevail.^{19/}

Finally, defendant appears to argue (Br. 35) that because he was acquitted on Count 1 at the first trial, the jury must also have viewed as incredible the evidence as to Counts 2 and 3. An almost identical contention was rejected in United States v. Scott, 464 F. 2d 832 (C.A. D.C., 1972). There a criminal defendant was tried on a three count indictment of armed robbery, robbery and assault with a deadly weapon. At his first trial Scott was found not guilty of armed robbery and assault with a dangerous weapon, but the jury was unable to agree as to the robbery count and a mistrial was declared. At the second trial, Scott was found guilty on the robbery count and on appeal he contended that the acquittal of the armed robbery count was an acquittal of the robbery count as well.

The court rejected that contention (464 F. 2d, p. 833):

* * * the first jury in acquitting
Scott of armed robbery did not there-
by acquit him of unarmed robbery,

^{19/} Defendant finds it "significant" (Br. 33) that in other cases before this Court it was the "true winner" who was convicted, not the person cashing the winning ticket and incorrectly filling out the verification form. In this contention he errs. In United States v. Kessler, 449 F. 2d 1315 (C.A. 2, 1971), the "true winner" and the person cashing the ticket and misrepresenting himself as the true winner were each convicted.

which was charged in a separate count of the indictment.. Had that acquittal been a finding that the appellant was not the robber, as he now claims, such finding would reasonably have extended to and controlled the robbery count also, with the result that a verdict of acquittal would have been reached on the robbery count.

But the fact that the first jury was unable to agree as to the robbery count is fatal to appellant's notion that the acquittal of armed robbery was based on a finding that he was not the robber.

Here, the defendant was acquitted on one count of violating 26 U.S.C. § 7206(2). But, as in Scott, the charges against defendant were not of such a nature that an acquittal on one necessarily compelled an acquittal on the others. Defendant suggests (Br. 35) that in order to acquit on Count One, the jury had to disbelieve the agents' testimony that they had seen the defendant go up to the window and fill out the Form 317 in a name other than his own. Presumably, it is also defendant's argument that if the jury disbelieved the agents as to Count One, the jury was also required to disbelieve the agents as to Counts Two and Three. But even assuming that the acquittal in the first trial on Count One was a result of the jury's disbelief of the agents' testimony, defendant has not even suggested why that would require the jury to reject the agents' testimony as to events which they observed on other days and which formed the basis for the offenses charged in the second

and third counts of the indictment. Moreover, at the first trial the Government's expert witness could not state definitely that the defendant had signed the name Miguel Valles to the verification form, whereas, as to the second and third counts, he positively identified the purported signature of Carlos Diaz as that of the defendant. It may well have been this difference in the evidence which induced the jury in the first trial to acquit the defendant of Count One of the indictment. As in Scott, if the jury had disbelieved the Government's evidence as to the second and third counts defendant would have been acquitted of those charges. He was not, however, and at the second trial the Government, as we have shown, presented sufficient evidence for the jury to reach a verdict of guilty as to the second and third counts.

III

THE DEFENDANT'S MISCELLANEOUS CLAIMS OF ERROR ARE WITHOUT MERIT

1. Defendant contends (Br. 36) that the trial judge committed three errors in his charge to the jury, by charging the jury (R. E, p. 2) that the defendant was indicted under 18 U.S.C., Section 2(b)--the aiding and abetting statute; by charging that the jury could find that the acts were committed on or about a certain date; and, by failing to inform the jury that the defendant had previously been acquitted of Count I.

Defendant raised only the second point at the completion of the charge. (R. E, pp. 161-164.) Accordingly, he may not assert as error those portions of the charge or omissions therefrom to which he now objects for the first time. Rule 30 Federal Rules of Criminal Procedure; United States v. Mac-Dougal-Pena, 545 F. 2d 833 (C.A. 2, 1976); United States v. Green, 505 F. 2d 731 (C.A. 3, 1974).

Even if these contentions were properly before this Court, we submit that they are without merit. First, defendant argues (Br. 36) that the judge ~~erred~~ in charging (R. E, p. 2) the jury that defendant was indicted for violating 18 U.S.C., Section 2(b), as well as for violating 26 U.S.C., Section 7206(2), because, he argues, the evidence adduced only demonstrated that he acted alone and not in connection with anyone else.

18 U.S.C., Section 2(b) provides in pertinent part--

Whoever * * * willfully causes an act to be done which if directly performed by him or another, would be an offense against the United States is punishable as a principal.

And, it was demonstrated at the trial, that by improperly and inaccurately signing and completing the NYRA form, defendant caused the New York Racing Association to file Internal Revenue Service Information Returns (Form 1099) which were false as to a material matter. Accordingly, defendant was properly indicted and convicted and the jury properly charged as to 18 U.S.C., Section 2(b).

Secondly, defendant argues (Br. 36) that the lower court erred in instructing the jury that it could find that the defendant committed the acts of which he was accused on or about January 21, 1976, and January 27, 1976, rather than on these specific dates. Yet, the indictment charged that the offenses were committed on or about certain dates, and as the trial judge noted, (R. E, p. 161), this is standard language and its use does not constitute error of the type which would mandate reversal.

Nor would it have been correct to charge the jury that defendant had previously been acquitted of the first count of the indictment, since a verdict on one count of an indictment cannot have any effect on the determination of the factual issues under another count (Bryson v. United States, 238 F. 2d 657 (C.A. 9, 1957), and since even plainly inconsistent verdicts fall within a jury's prerogative. See United States v. Zane, 495 F. 2d 683 (C.A. 2, 1974), cert. denied sub nom. Persky v. United States, 419 U.S. 895 (1974).

2. Defendant also argues that statements by Government trial counsel in his closing argument that the defendant's defense was not clear and that he had not heard defendant deny signing the verification forms were such as to cause the jury to believe that defendant bore the burden of proof as to his innocence and that the defendant had either admitted his guilt or committed perjury.

We submit, however, that assuming arguendo the Government prosecutor's statements were improper, they would not cause substantial rights of the defendant to be violated and, accordingly, the statements would not mandate a reversal of the conviction. United States v. Bell, 535 F. 2d 886, 888 (C.A. 5, 1976); cf. United States v. Canniff, 521 F. 2d 565, 572 (C.A. 2, 1975).

Furthermore, immediately after Government counsel's statement (R. D, p. 81) that "it was unclear to me and I think it was unclear to you as to exactly what the defense was in this case, the trial court stated that "its up to the jury which facts are clear or unclear apart and aside from anything which counsel states" (ibid.), and Government counsel himself stated (ibid.):

From my last comment I did not mean to imply or suggest that the defendant has any burden. The Government has a responsibility.

The other remark of which defendant complains occurred during Government counsel's rebuttal argument, when he stated (R. D, pp. 118-119):

Do you remember Danny Perez take the stand and deny under oath he did not sign those forms. I didn't hear that and I don't think any of you heard that, and that's the threshold of question. The defendant doesn't have to prove a single thing but once the defendant takes the witness stand like any other witness, he's to be judged as any other witness and perjury or lying to the jury--

Defense counsel objected (R. D, p. 119) and the court stated (ibid.):

We don't have that in this case.
We don't have that as one of the
crimes in this case.

The court then denied a motion for a mistrial and instructed the jury that (ibid.):

The jury will disregard it, it's not
one of the crimes before the jury,
and the jury is to believe the
credibility, of any witness before
this Court. That's the jury's
province and the jury has no right
to decide anything other than that.

Government counsel then stated that (R. D, pp. 119-120):

If I misspoke, I apologize. When a
defendant takes the stand you have
the right to judge what he says the
way you would any other witness. If
you feel he misstated something to
you, you have a right to reject all
or part of his testimony and in
particular, when a defendant takes
the stand you have a right to credit
or discredit his testimony based upon
what he says just the way as you would
any other witness.

The question is whether the
government has met its burden of proof.

We submit that the court's instruction to disregard the
remark and the prosecutor's immediate correction cured any
prejudice occasioned by the remark.

3. Finally, defendant submits that the interests of
justice would be served by a (Br. 38) "dismissal of the

indictment" since the amounts involved are insignificant. Yet, it was clearly shown that if defendant had been successful, over \$1,200 in income would have been attributed to a fictitious person. The defendant's acts fell within the proscription of Section 7206(2), and he was prosecuted accordingly.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 29th day of June, 1977, in an envelope, with postage prepaid, properly addressed to her as follows:

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